



Arizona Public Service Company
FOUR CORNERS STEAM ELECTRIC STATION
P.O. Box 355 • FRUITLAND, NEW MEXICO 87416

January 8, 2015

CERTIFIED MAIL

Gary Sheth
NPDES Permits Section,
Water Division (WTR-2-3)
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

RE: Comments on Proposed Four Corners NPDES Permit No. NN0000019

Arizona Public Service Company (APS) appreciates the opportunity to provide comments on the Environmental Protection Agency's (EPA or Agency) proposed NPDES draft permit and fact sheet for the Four Corners Steam Electric Station.

As discussed in the attached comments, APS would like to point out a few technical discrepancies found in the proposed draft NPDES permit and fact sheet. APS respectfully requests that EPA consider these comments in the development of the final NPDES permit.

If you have any questions regarding this submittal, please contact Craig Chavet by phone at (602) 250-5310.

Sincerely,

Thomas Livingston
Four Corners Plant Manager
Four Corners Steam Electric Station

Bcc:	P. Norris, w/ attachments	4981
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I. Draft Permit

a. Part 1, Section B.2 Surface Seepage

Section B.2, states in part, “Surface seepage intercept systems shall be constructed and operated for existing and future unlined ash ponds. Water collected by these intercept systems shall be returned to the ash ponds, or evaporation ponds.”

APS requests that this paragraph be revised to remove the reference to “unlined ash ponds”, and reflect that intercept systems shall be constructed and operated for existing unlined ash ponds – which is consistent with the wording in the NPDES permit fact sheet. Additionally, in this same section, the permit should reflect that intercept water is returned to the double lined water decant pond, which is also consistent with the language in the fact sheet, as opposed to the permit reference that intercept water is “returned to the ash ponds or evaporation ponds.”

b. Part 3, Section A, Seepage Management and Monitoring Plan

Section A.1, references that the seepage and monitoring plan shall be developed to identify all seeps within 100 meters down gradient of ash impoundments. The referenced 100 meters is inconsistent with the permit fact sheet that states that the seepage monitoring is located within 650 meters of the ash impoundments. The geology in the area supports the location of the seepage monitoring within 650 meters and APS requests that the permit be changed to reflect this distance.

II. Draft Fact Sheet and Permit

As part of arms-length negotiations between APS and the Navajo Nation, the Navajo Nation granted APS a covenant not to regulate. Specifically, the Four Corners Power Plant owners’ lease with the Navajo Nation provides that the Navajo Nation “will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company, or its rates, charges, operating practices, procedures, safety rules, or other policies or practices. . . .” This covenant not to regulate was approved by or otherwise reaffirmed by the Navajo Nation in the original 1960 Lease, the 1966 Supplemental and Additional Lease, the 1985 Lease Amendment, and again in 2011 with Lease Amendment No. 2 and Lease Amendment No. 3. The Department of Interior has similarly approved the lease and amendments containing the covenant not to regulate each time this question was before it. Moreover, the covenant not to regulate has been upheld by the United States Court of Appeals for the Ninth Circuit as lawful and binding on the Navajo Nation. In *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1995), the court held that “[t]he clear language contained in the Lease Documents, including the Non-regulation Covenant,” demonstrate an “unmistakable waiver” by the Navajo Nation of regulatory authority at Four Corners.” Ten years later, the Navajo Nation Attorney General acknowledged the covenant not to regulate in an amicus brief filed in *Dixon v. Babcock & Wilcox Constr. Co.*, No. NLC 2005-030 (Navajo Nation Labor Comm’n), when it quoted *Aspaas* with approval. Finally, just last year, in *Salt River Project Ag. Improvement & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 WL 321884 (D. Ariz. Jan. 28, 2013), the United States District Court for the District of Arizona read the plain language of the covenant not to regulate to prohibit regulation of the “operations” of Navajo Generating

Station, whose lease contains a similar covenant not to regulate, to foreclose regulation of “how the [generating station] is run.” In upholding applicability of the covenant not to regulate, the court placed special weight on the term “operations” contained in the covenant and adopted the plain meaning of “operate” to mean “the exertion of force or influence; working, activity; a manner of working, the way in which a thing works.”

Finally, the Navajo Nation itself, by its regulatory conduct subsequent to the existence of the covenant not to regulate, evinces agreement with the courts’ interpretation of the covenant. In each of the major environmental statutes enacted by the Navajo Nation, the tribe explicitly provides that the environmental regulations “shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid waiver of jurisdiction or covenant not regulate or otherwise exercise jurisdiction over such person or property.” While those statutory carve-outs cannot be construed as an express admission regarding the validity of the covenant, which has, in any event, already been decided by federal courts and expressly acknowledged by the Navajo Nation Department of Justice, they certainly demonstrate the Navajo Nation’s understanding that its covenants not to regulate may bar it from regulating the environmental impacts of the plant. See Navajo Nation Code, tit. 4, § 2106(B)(2) (CERCLA); *id.*, tit. 22, § 2505(C) (Safe Water Drinking Act); *id.*, tit. 4, § 104(B) (Solid Waste Act); *id.*, tit. 4, § 1504(B) (Underground Storage Tank Act); *id.*, tit. 4, § 1307(B) (Clean Water Act); *id.*, tit. 4, § 304(B) (Pesticide Act).

These federal court decisions and actions taken by the Navajo Nation evince that the tribe has waived its sovereign power to regulate Four Corners Power Plant activities affecting water quality on the reservation. Accordingly, APS requests that EPA remove Special Condition III.A.4. in the draft NPDES permit, which reads as follows: *“Provide information about exceedances of any human health, livestock, or chronic or acute aquatic life standards as established in the 2007 NNWQS in the samples collected for analysis.”* For these same reasons, APS also requests that EPA remove the following language from the Fact Sheet accompanying the draft NPDES permit:

- Section V: *“However, EPA has included monitoring in the permit for several additional parameters in order to further verify these assumptions. Although EPA has determined that the discharges do not have a reasonable potential to cause or contribute to an exceedance of water quality standards, the permit sets general conditions based on narrative water quality standards contained in Section 202 of the Navajo Nation Surface Water Quality Standards 2007. These standards are set forth in the Section entitled General Discharge Specifications of the permit.”* (Consistent therewith, please also delete the bracketed words “or Tribal” contained in the third paragraph of p. 5 of the Fact Sheet.)
- Section VI.B: *“and Navajo Nation Water Quality Standards”*
- Section VII.A: *“The Navajo Nation water quality standards contains narrative water quality standards applicable to the receiving water. Therefore, the permit incorporates applicable narrative water quality standards.”*
- Section VII.C.4: *“Provide information about exceedances of any human health, livestock, or chronic or acute aquatic life standards in the samples collected for analysis.”*

Finally, APS notes that Section XII.D. of the Fact Sheet *“references certification from the affected State, Territory, or Tribe that the proposed permit will meet all applicable water*

quality standards." APS refers the agency to EPA's Decision Document for the Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act dated January 20, 2006. In that document, EPA explains that in its application for treatment as a state, the Navajo Nation expressly excluded Morgan Lake from the scope of the application. As a result, EPA concluded that the application "effectively does not include land the Tribe leases for the Four Corners Power Plant and Navajo Generating Station," including Morgan Lake. Moreover, as discussed above, the Four Corners Power Plant co-owners' lease with the Navajo Nation expressly prohibits the applicability of Navajo Nation surface water quality standards to the plant. Accordingly, no Clean Water Act Section 401 certification is required from the Navajo Nation for purposes of the Four Corners Power Plant NPDES permit, and the Fact Sheet should be modified to reflect this.

As discussed above, making Clean Water Act Section 401 certification requirements and Navajo Nation water quality standards applicable to activities affecting water quality on the reservation under the Four Corners Power Plant NPDES permit would be the equivalent of finding the covenants not-to-regulate to be of no effect, in contradiction of existing federal case law. APS, therefore, requests that EPA not include the italicized language above in the final NPDES permit and Fact Sheet.